BOB BEGAY
v.
ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-47-A Decided September 20, 1991

Appeal from the denial of a grazing permit on the Hopi Partitioned Lands.

Dismissed.

1. Appeals: Generally--Board of Indian Appeals: Jurisdiction

The Board of Indian Appeals lacks jurisdiction to review decisions rendered by the Assistant Secretary - Indian Affairs except when those decisions are specifically referred to it by the Secretary or the Assistant Secretary, or when a right of review is established in regulations.

2. Appeals: Generally--Indians: Generally

The Board of Indian Appeals is not required to consider issues and arguments that are raised for the first time on appeal.

3. Appeals: Generally--Board of Indian Appeals: Jurisdiction

When the parties in a case before the Board of Indian Appeals are identical to those in a case decided by the Assistant Secretary - Indian Affairs, the case raises the same issues, and the issues arise from the same transaction, the Board, as a matter of comity, will defer to the Assistant Secretary's decision because the appellant has already received a decision by a Secretarial-level official of the Department.

APPEARANCES: Helen A. Tuddenham, Esq., Tuba City, Arizona, for appellant; Wayne C. Nordwall, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Area Director; Tim Atkeson, Esq., Denver, Colorado, for intervenor Hopi Tribe.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Bob Begay seeks review of a December 21, 1989, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (BIA; Area Director), denying his application for a grazing permit on the Hopi Partitioned Lands (HPL). For the reasons discussed below, the Board of Indian Appeals (Board) finds that this appeal must be dismissed.

## Background

Appellant is a member of the Navajo Nation, awaiting relocation under the Navajo-Hopi Settlement Act, as amended, 25 U.S.C. §§ 640d through 640d-28 (1988) (settlement act). 1/ Appellant was determined eligible to graze livestock on the HPL through October 31, 1982. He reapplied for a grazing permit on November 8, 1982. According to statements by various BIA officials, site visits were made to appellant's residence on the HPL, and there was no evidence that he was residing there. Therefore, appellant was determined to reside off the HPL and to be ineligible for a grazing permit. Appellant was informed of this determination in an August 4, 1983, letter from the Hopi Agency Superintendent, BIA (Superintendent). The letter also stated that appellant could appeal the determination, provided him with a copy of the appeal regulations, and enclosed an address where he could obtain additional information.

Appellant acknowledges receipt of this decision. Although he did not personally appeal from the decision, his name was listed on a blanket appeal filed in February 1983 by the Navajo Nation on behalf of 687 of its tribal members. Appellant's situation was reviewed and addressed in a December 20, 1983, decision rendered by the Assistant Secretary - Indian Affairs. The Assistant Secretary affirmed the denial of appellant's grazing application. 2/ This decision, which was sent to the Navajo Nation Department of Justice, concluded:

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1/ Unless otherwise specified, all further references to the United States Code are to the 1988 edition.

2/ The Navajo Nation's appeal lists appellant as an individual whose grazing permit was "wrongfully restricted." Any restrictions on appellant's grazing permit would have predated the Aug. 4, 1983, denial of a permit. Appellant has not raised any issues relating to restrictions placed upon an earlier permit.

In regard to appellant, the Assistant Secretary's decision stated:

"BEGAY, Bob - C # 1,883

"Allocation for 1982 based on [Joint Use Area] Permit No. 14-20-00502 issued 07/01/80 and interview conducted on 10/22/81 at Mr. Begay's residence in which Mr. Begay stated he owned 20 sheep and one cow. Mr. Begay has since moved from the HPL and was notified of the decision on 08/04/83."

Thus, although appellant was originally listed as an individual whose permit had been wrongfully restricted, the Assistant Secretary was aware of the later determination of ineligibility based upon residence, and specifically addressed that issue in his decision.

> Inasmuch as the issues involved in this appeal are presently before the court in Zee v. Watt, Civ. No. 83-200 PCT-EHC [D.Ariz. Mar. 29, 1985], further administrative appeal of this decision would not be in the interest of the Department or the appellants. Therefore, pursuant to the authority delegated to me at 209 DM-8, this decision is final for the Department and appellants' administrative remedies are, under the regulations at 25 CFR 2.3, exhausted.

There is no evidence that the determination of appellant's ineligibility was pursued through further appeal, either by appellant or the Navajo Nation.

Appellant reapplied for a grazing permit on March 12, 1984. His application was returned by letter dated January 17, 1985, which stated:

> According to our records, you previously applied and on August 4, 1983 you were notified by certified mail that you were not eligible for a grazing permit. The same notice informed you of your right to appeal that decision.
>
> We received no notice of appeal and the time for appealing expired on September 5, 1983. Your ineligibility for a grazing permit was determined in our previous decision and became final for the Department of the Interior upon expiration of the appeal period. Therefore, your recent application is returned herewith.

In response to this letter, an attorney for appellant filed a request for materials pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (1982). No further administrative review was sought.

Appellant filed another application for a grazing permit on January 5, 1989. Appellant's application was again returned with a letter stating that he had been determined ineligible on August 4, 1983, and had failed to appeal that determination. Counsel for appellant filed a timely appeal from this letter. 4/

In briefing before the Area Director, appellant argued that he had been away from his home in the HPL because of the serious illness of a

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3/ Zee was dismissed on Mar. 29, 1985. The court stated:

"The underlying claims in this proceeding are directly related to the Navajo-Hopi Settlement Act, 25 U.S.C. § 640d et seq. As such, individual tribal members have no standing to maintain this action. Sekaquaptewa v. MacDonald, 544 F.2d 396, 403 (9th Cir. 1979); Sidney v. MacDonald, 536 F. Supp. 420 (D. Ariz. 1982), aff'd, Sidney v. Zah, 714 F.2d 1453, 1457 (9th Cir. 1983)."

4/ Appellant states in his opening brief that he filed another application for a grazing permit on Sept. 17, 1990.

close relative and the necessity to assist the relative during the winter. He stated that, following the relative's death in May 1983, he returned to his home. He further stated that he does not read or understand English, and that although he understood his application had been denied, he did not understand he had a right to appeal the denial. Appellant maintains he is a resident of the HPL and the Assistant Secretary's 1983 decision to the contrary is incorrect. He contends that his residency is confirmed by records of the Navajo and Hopi Relocation Commission.

In the December 21, 1989, decision on appeal, the Area Director recited the background relative to appellant's case, noting that the Assistant Secretary had reviewed the matter in 1983. The Area Director concluded: "The Navajo Nation had ample opportunity to file appeal documents supporting their claim that Mr. Begay was an HPL resident. Based on the record, the Assistant Secretary - Indian Affairs reviewed Mr. Begay's situation and concluded on December 20, 1983 that Mr. Begay was not an HPL resident."

The Board received appellant's appeal from this decision on January 30, 1990. Briefs were filed by appellant, the Area Director, and the Hopi Tribe as intervenor.

## Standing

The Area Director first argues that, except for suits involving eligibility for relocation benefits, actions arising under the settlement act may be brought only by the Chairmen of the Navajo Nation and the Hopi Tribe, acting on behalf of their tribes and the individual members. Accordingly, the Area Director contends that appellant lacks standing to bring this appeal as an individual. In support of this position, the Area Director cites Benally v. Hodel, 913 F.2d 1464 (9th Cir. 1990); Bedoni v. Navajo-Hopi Relocation Commission, 878 F.2d 1119 (9th Cir. 1989); Walker v. Navajo-Hopi Indian Relocation Commission, 728 F.2d 1276 (9th Cir.), cert. denied, 469 U.S. 918 (1984); and Zee, supra. See also 25 U.S.C. § 640d-7.

The cases cited by the Area Director indicate that suits challenging the implementation of the settlement act must be brought by the tribal chairmen. As noted supra at note 3, the court in Zee dismissed for lack of standing individual challenges to the implementation of the interim grazing regulations. In distinction, Walker holds that an individual can maintain suit to challenge the amount of relocation benefits to which he or she is entitled.

The prior history of this matter suggests that the Navajo Nation believed it was responsible for bringing administrative appeals on behalf of its tribal members over grazing issues. In 1983, the Navajo Nation filed such appeals on behalf of 687 tribal members, including appellant, whose grazing permits were denied or restricted. This was treated as an appropriate appeal by the Assistant Secretary.

Appellant argues that the present appeal is specifically authorized under 43 CFR 4.331, 5/ and that it is more closely related to the specific, personal interests at stake in Walker than to the more general challenges to the settlement act, the regulations, and their implementation addressed in the other cases cited by the Area Director.

The Area Director did not question appellant's standing when he issued his 1989 decision. Furthermore, 25 CFR 168.18 provides that appeals under 25 CFR Part 168 may be taken through the procedures in 25 CFR Part 2, which culminate with an appeal to the Board. Although it appears at least possible that appellant would be found to lack standing in Federal court, under the circumstances of this case the Board declines to hold that he lacks standing for the purposes of this administrative appeal.

## Discussion and Conclusions

In essence, appellant argues that he should not be bound by either the August 4 or December 20, 1983, determinations that he was ineligible for a grazing permit. He contends that those decisions were factually incorrect and he did not have an opportunity to litigate the question of his residency. Furthermore, appellant argues that because he was not aware the Navajo Nation had appealed on his behalf, he should not be bound by the Assistant Secretary's decision.

[1] The Assistant Secretary's decision affirmed the finding that appellant was not eligible for a grazing permit because he did not reside within the HPL. The decision stated that it was final for the Department. The Board lacks jurisdiction to review decisions rendered by the Assistant Secretary except when those decisions are specifically referred to it by the Secretary or the Assistant Secretary, or when a right of review is established in regulations. See, e.g., 25 CFR 2.6(c), 2.20(c); Three Irons v. Acting Assistant Secretary - Indian Affairs, 19 IBIA 46 (1990); Spokane Tribe of Indians v. Acting Assistant Secretary - Indian Affairs, 18 IBIA 379 (1990). Decisions of the Assistant Secretary are normally final for the Department. 6/

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5/ Section 4.331 provides:

"Any interested party affected by a final administrative action or decision of an official of the Bureau of Indian Affairs issued under the regulations in Title 25 of the Code of Federal Regulations may appeal to the Board of Indian Appeals, except--

"(a) To the extent that decisions which are subject to appeal to a higher official within the Bureau of Indian Affairs must first be appealed to that official;

" (b) Where the decision has been approved in writing by the Secretary or Assistant Secretary -Indian Affairs prior to promulgation; or

" (c) where otherwise provided by law or regulation."

6/ If the Board were to accept appellant's argument that he should not be bound by the Assistant Secretary's decision because he did not know the Navajo Nation had taken an appeal on his behalf, the determination of

Appellant argues for the first time in his reply brief that the issue of residency is a new question each time he applies for a grazing permit, and must, therefore, be determined again for each new application. If this argument were accepted, the Assistant Secretary's decision would be conclusive only for the 1982 application.

[2] Initially, the Board notes that it is not required to consider arguments raised for the first time on appeal. See, e.g. Kombol v. Acting Assistant Portland Area Director (Economic Development), 19 IBIA 123, 129 (1990), and cases cited therein.

[3] However, even if the Board were to consider appellant's argument, it would still not redetermine the question of residency. When the parties in a case before the Board are identical to those in a case decided by the Assistant Secretary, the case raises the same issues, and the issues arise from the same transaction, the Board, as a matter of comity, will defer to the Assistant Secretary's decision because the appellant has already received a decision by a Secretarial-level official of the Department. See, e.g., Tohono O'odham Nation v. Phoenix Area Director, 15 IBIA 147 (1987); Kiowa Business Committee v. Anadarko Area Director, 14 IBIA 196 (1986); Willie v. Commissioner of Indian Affairs, 10 IBIA 135 (1982). Therefore, under the doctrine of comity, the Board would defer to the Assistant Secretary's finding that appellant was not residing on the HPL in 1983.

The Assistant Secretary's 1983 decision establishes that appellant's residency in the HPL was, at the least, interrupted. Appellant has presented no arguments or evidence allowing the legal conclusion that residency in the HPL, once interrupted, can be reestablished so that an individual would meet the requirements of 25 CFR 168.6(b), that, in order to be eligible for grazing permits, Navajo tribal members must "have maintained * * * a permanent residence on Hopi Partitioned Lands." (Emphasis added.) The Board notes that a conclusion allowing the reestablishment of residency for this purpose would be contrary to the spirit and intent of the settlement act. See, e.g., 25 U.S.C. § 640d-13. 7/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the

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fn. 6 (continued)
ineligibility would still be final, based upon appellant's failure to file a timely appeal from the Superintendent's Aug. 4, 1983, decision. 25 CFR 2.3(a) (1983) provided a right of appeal from a Superintendent's decision to the Area Director. 25 CFR 2.10(b) (1983) stated: "No extension of time will be granted for filing of the notice of appeal. Notices of appeal which are not timely filed will not be considered, and the case will be closed."

7/ This opinion addresses only appellant's eligibility for a grazing permit under 25 CFR Part 168. It does not consider appellant's eligibility for relocation assistance, which is determined by the Navajo and Hopi Indian Relocation Commission under 25 CFR Part 700.

December 21, 1989, decision of the Acting Phoenix Area Director is dismissed.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge